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IN THE
COURT OF APPEALS OF INDIANA

JACK RUNION,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 64A03-0601-CV-34
	)	
ACUITY, a Mutual Insurance Company,	)	
	)	
Appellee.	)	

APPEAL FROM THE PORTER SUPERIOR COURT
The Honorable William E. Alexa, Judge
Cause No. 64D02-0404-PL-3343

January 17, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Jack Runion ("Runion") filed a complaint in Porter Superior Court against Acuity, a Mutual Insurance Company ("Acuity") seeking a declaratory judgment that an Acuity policy sold to Indiana Climate Control provided coverage for injuries suffered by Runion in an airplane crash. In response, Acuity filed a complaint seeking a declaratory judgment that the insurance policy does not provide coverage for Runion's claims.

Acuity then moved for summary judgment arguing that the aircraft exclusion in the policy barred coverage. The trial court granted Acuity's motion. Runion appeals and argues that genuine issues of material fact exist and the aircraft exclusion does not bar coverage as a matter of law. Concluding that the trial court properly entered summary judgment in favor of Acuity, we affirm.

Facts and Procedural History

Gene Lane ("Lane") and Dan Nicksic ("Nicksic") are partners in Turbo Flite, LLC. They formed the company for the express purpose of purchasing an aircraft. In 2000, the company purchased a single engine Piper Turbo Lance aircraft. Lane is also the president of Indiana Climate Control ("ICC"). ICC had an oral agreement with Turbo Flite permitting ICC to use the aircraft. ICC paid half of the fixed expenses and all of the variable expenses associated with ICC's use of the aircraft in addition to an hourly rate of $90.

On April 19, 2002, Lane was piloting the aircraft in his capacity as an employee of ICC and Runion was his passenger. The aircraft crashed shortly after taking off from the Porter County Municipal Airport. Runion suffered severe injuries including a crushed sternum, fractured skull, a shattered LI vertebrae, and a fractured left wrist.

On April 14, 2004, Runion filed a complaint against ICC, Turbo Flite, and Lane, alleging that Lane negligently piloted the aircraft. On that same date, Runion filed a complaint seeking a declaratory judgment that Acuity, ICC's insurance carrier, "owes [ICC] defense and indemnity in [Runion's] underlying tort suit against" ICC. Appellant's App. p. 21. In response, Acuity filed a complaint for declaratory judgment alleging that there is "no coverage as a matter of law under the Acuity policy . . . for any of the claims made against ICC arising from the April 19, 2002 aircraft crash because the policy specifically excludes coverage for injuries sustained as a result of an aircraft crash." Appellant's App. p. 27.

Acuity filed a motion for summary judgment on September 23, 2005.[1] The trial court granted Acuity's motion and found:

> The insurance contract between Acuity and ICC excludes bodily injury or property damage relating to the use of an aircraft by the insured, ICC. The bodily injury and/or property damage sustained by Runion resulted from the use of an aircraft by the insured. As a result, ICC has no coverage for the injuries sustained by Jack Runion in the plane crash.

Appellant's App. p. 17. Runion now appeals. Additional facts will be provided as necessary.

Standard of Review

> When reviewing a grant or denial of summary judgment our well-settled standard of review is the same as it is for the trial court: whether there is a genuine issue of material fact, and whether the moving party is entitled to judgment as a matter of law. Summary judgment should be granted only if the evidence sanctioned by Indiana Trial Rule 56(C) shows that there is no genuine issue of material fact and the moving party deserves judgment as a matter of law. All evidence must be construed in favor of the opposing

[1] Acuity's first motion for summary judgment was denied without prejudice to allow the parties to conduct further discovery.

> party, and all doubts as to the existence of a material issue must be resolved against the moving party.

Monroe Guar. Ins. Co. v. Magwerks Corp., 829 N.E.2d 968, 973 (Ind. 2005) (internal citations omitted).

"Generally, the interpretation of an insurance policy presents a question of law and is thus appropriate for summary judgment." Morris v. Econ. Fire & Cas. Co., 848 N.E.2d 663, 665-66 (Ind. 2006). "A contract for insurance 'is subject to the same rules of interpretation as are other contracts.'" Id. at 666 (quoting USA Life One Ins. Co. of Ind. v. Nuckolls, 682 N.E.2d 534, 537-38 (Ind. 1997)). "If the language in the insurance policy is clear and unambiguous, then it should be given its plain and ordinary meaning, but if the language is ambiguous, the insurance contract should be strictly construed against the insurance company." Id.

> "This is especially true where the policy language in question concerns an exclusion clause." When an insurance company fails to clearly exclude "that which the insured attempted to protect against, we must construe the ambiguous policy to further the policy's basic purpose of indemnity." A policy is ambiguous only if it is "susceptible to more than one interpretation and reasonably intelligent persons would differ as to its meaning."

Matteson v. Citizens Ins. Co of Am., 844 N.E.2d 188, 192 (Ind. Ct. App. 2006) (quoting Nuckolls, 682 N.E.2d at 538).

Discussion and Decision

ICC obtained business liability coverage from Acuity and the policy at issue provides in pertinent part:

> 1. Business Liability
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury, property damage, personal injury* or

> *advertising injury* to which this insurance applies. We will have the right and duty to defend the insured against any *suit* seeking those damages. However, we will have no duty to defend the insured against any *suit* seeking damages for *bodily injury, property damage, personal injury* or *advertising injury* to which this insurance does not apply.

Appellant's App. p. 58 (emphasis in original). The policy contains an exclusion for "Aircraft, Auto or Watercraft," which excludes coverage for "*[b]odily injury* or *property damage* arising out of the ownership, maintenance, use or entrustment of others of any aircraft, auto or watercraft owned or operated by or rented or loaned to any insured." Appellant's App. p. 61 (emphasis in original).

However, the aircraft exclusion does not apply to "[l]iability assumed under any *insured contract* for the ownership, maintenance or use of aircraft or watercraft[.]" Id. (emphasis in original). Under the policy, an insured contract is defined in pertinent part as: "[t]hat part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another party to pay for *bodily injury* or *property damage* to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement." Appellant's App. pp. 63-64 (emphasis in original).

Runion contends that the Acuity policy provides coverage for his claims arising out of the aircraft crash "because ICC had an insured contract with Turbo Flite, Gene Lane and Dan Nicksic assuming their tort liabilities to Mr. Runion." Br. of Appellant at 6-7. Stated differently, Runion asserts that the "aircraft exclusion does not apply because

the insured contract brings into play the insured contract exception to the aircraft exclusion[.]"[2] Id. at 7.

In support of his argument, Runion relies on an Iowa Supreme Court decision interpreting similar policy language. See John Deere Ins. Co. v. De Smet Ins. Co. of South Dakota, 650 N.W.2d 601 (Iowa 2002). In that case, an employee of Pedersen Machine, Inc. was involved in an automobile accident in the course of delivering a farm implement to a customer. Id. at 602. The employee was driving a pickup truck owned by Donald Hubert, another Pedersen Machine employee. Id. Pedersen Machine was interested in purchasing the truck and was using it on a trial basis. Id. at 603.

Before using the truck, Pedersen Machine's owner was assured by its insurer, John Deere Insurance Co., that Hubert's truck would be "covered" for deliveries. Id. Hubert was insured by De Smet Insurance Co., and De Smet defended both Hubert and the driver of the truck in the litigation that arose due to the accident. After a settlement was reached with the party injured in the accident, John Deere commenced a declaratory judgment action to recover its share of the settlement and defense costs from De Smet. Id.

De Smet argued that the John Deere policy provided primary coverage for the claims that arose out of the accident because the agreement between Hubert and Pedersen Machine concerning coverage on the truck constituted an "insured contract." Id. Specifically, De Smet asserted that the "insured contract" provision in the John Deere

[2] In general, "[a]n exception to an exclusion cannot create coverage where none exists. Exclusion clauses do not grant or enlarge coverage; rather, they are limitations on the insuring clause." Amerisure Inc. v. Wurster Constr. Co., Inc., 818 N.E.2d 998, 1005 (Ind. Ct. App. 2004) (citing Ind. Ins. Co. v. DeZutti, 408 N.E.2d 1275, 1280 (1980)). "In simplistic terms, the process is such: if the insuring clause does not extend coverage, one need look no further. If coverage exists, exclusions must then be considered. If an exclusion excludes coverage, an exception to the exclusion may re-grant coverage." Id.

policy transformed the coverage available from excess to primary coverage. Id. The John Deere policy contained an exclusion for "liability assumed under any contract or agreement" but the exclusion did not apply to liability for damages "assumed in a contract or agreement that is an 'insured contract[.]'" Id. at 604. Under the policy, an "insured contract" was defined as "that part of any other contract or agreement pertaining to your business . . . under which you assume the tort liability of another to pay for 'bodily injury' or 'property damage' to a third party or organization. Tort liability means liability that would be imposed by law in the absence of any contract or agreement." Id.

In interpreting these policy provisions, the court stated, "the only question posed by the policy language is whether (1) an agreement was reached, (2) pertaining to the business, (3) by which the insured (Pedersen Machine) assumed the tort liability of another for bodily injury or property damage sustained by a third party." Id. at 607. Moreover, the court noted that the definition of "insured contract" in the policy "places no limits on whether the tort liability allegedly assumed would or would not rest with the insured as a matter of law." Id. The court concluded that "[t]he record undeniably supports such an agreement here and, . . . [John] Deere is bound thereby." The court therefore held that John Deere's coverage under the policy converted to primary coverage. Id.

Runion argues that "[l]ike John Deere, the only question posed by the policy language is whether (1) an agreement was reached, (2) pertaining to the business, (3) by which the insured (Indiana Climate Control) assumed the tort liability of another (Turbo Flite and Gene Lane) for bodily injury or property damage sustained by a third party (Jack

Runion)." Br. of Appellant at 23. In his complaint for declaratory judgment, Runion alleged that ICC "assumed liability under an insured contract with Turbo [Flite] LLC and/or Gene Lane for the use of the subject aircraft." Appellant's App. p. 51.

However, Runion's allegation is unsupported by the record. In an affidavit designated to the trial court in these proceedings, Lane made the following statements concerning ICC's agreement with Turbo Flite and Lane:

> 10. [ICC] had an agreement with Turbo Flite and me that allowed [ICC] to use the aircraft. While we did not enter into a written agreement, we clearly had an agreement.
> 11. Under this agreement [ICC] paid Turbo Flite half of the fixed expenses for the aircraft, all of the variable expenses (such as fuel) associated with [ICC's] use of the aircraft, and an hourly rate of approximately $90 for every flight hour [ICC] flew. While we never expected to have a plane crash, in looking back at this and knowing our understanding I can say [ICC] assumed all of the risks tied to its use of the aircraft and Dan Nicksic assumed all of the risks tied to his use of the aircraft. The risks included [] damage to the aircraft, damage to other property, and damage to people.
> 12. I expected [ICC] to defend against or pay all claims against any of us for damage as a result of my flying the aircraft for [ICC]. Similarly, I expected Dan Nicksic to defend against or pay all claims against any of us for damage as a result of his flying the aircraft. [ICC] and Turbo Flite attempted to manage these risks with appropriate insurance purchases.

Appellant's App. pp. 446-47.

In support of its motion for summary judgment, Acuity submitted Dan Nicksic's deposition. Nicksic testified that he and Lane were primarily concerned with the payment of costs associated with the use of the aircraft. Id. at 369. Nicksic stated that he and Lane did not "discuss assumption of risks tied to use of the aircraft." Id. at 377. Nicksic also testified that he and Lane had no formal agreement concerning risks associated with use of the aircraft. Id. at 383-84. Finally, Nicksic indicated that he and

Lane did not discuss whether ICC would indemnify Turbo Flite for losses arising out of ICC's use of the aircraft. Id. at 388-89.

From Lane's affidavit and Nicksic's deposition testimony, a reasonable inference can be made that ICC and Turbo Flite had an agreement concerning how costs would be shared for use of the aircraft. However, we cannot reach the same conclusion with regard to whether ICC agreed to assume the tort liability of Turbo Flite. Lane's affidavit merely describes what his unilateral expectation was after the airplane crash concerning assumption of risks. Nicksic's testimony and Lane's affidavit do not support a reasonable inference that ICC assumed liability under an "insured contract." Accordingly, we conclude that the "insured contract" exception to the aircraft exclusion does not apply, and Acuity was therefore entitled to summary judgment as a matter of law.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.